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IN THE

Supreme Court of the United States

October Term, 1970

No. 821

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

VS

GREATER BUFFALO PRESS, INC., *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM

The appellees move pursuant to Rule 16 of this Court to affirm the judgment sought to be reviewed on this appeal on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

The trial court announced no new proposition of law. It merely applied oft stated principles to the facts as found. The trial court's decision is limited to these facts and is not one of general application and cannot foreseeably affect other cases.

Statement of Case

The complaint in this case was filed in January, 1961 and charged The Hearst Corporation with violating Section 3 of the Clayton Act and conspiring to violate Sections 1 and 2 of the Sherman Act; Newspaper Enterprise Association, Inc. with violating Section 3 of the Clayton Act and conspiring to violate Sections 1 and 2 of the Sherman Act; and Greater Buffalo Press, Inc. with violating Section 2 of the Sherman Act, Section 7 of the Clayton Act, and conspiring to violate Sections 1 and 2 of the Sherman Act.

All that remains of these charges is an appeal by the government from the dismissal of the Section 7 violation alleged against Greater Buffalo Press.

On May 26, 1970 after a protracted trial a final judgment was entered in the District Court for the Western District of New York dismissing the complaint against Greater Buffalo Press and its subsidiaries and dismissing the complaint against Newspaper Enterprise Association, Inc. The Court decided that the acquisition by Greater Buffalo Press of the stock of International Color Print Corporation in 1955 did not violate Section 7 of the Clayton Act (15 U. S. C. § 18). The Court also dismissed charges of conspiracy under Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1, 2) and charges that Newspaper Enterprise Association, Inc. violated Section 3 of the Clayton Act (15 U. S. C. § 14). Much earlier in the litigation, on August 31, 1965, a consent decree was entered with respect to the Hearst Corporation and its subsidiary King Features Syndicate.

The government now seeks to appeal from only that portion of the judgment which dismissed charges against Greater Buffalo Press, Inc. alleging a violation of Section 7 of the Clayton Act. The charges originally brought

against the defendant Hearst Corporation and its subsidiary King have been dropped by entry of the consent decree and the government is not appealing the dismissal of the other charges against either Greater Buffalo Press or Newspaper Enterprise Association because of what the government calls "changed circumstances" (Jurisdictional Statement fn. 2, pp. 4-5).

Opinion Below

The opinion of the District Court is reported at CCH Trade Cases ¶ 73,195 (W. D. N. Y. 1970) and is set forth at pages 23-43 of the appellant's Jurisdictional Statement.

Summary of Argument

The decision of the District Court dismissing the complaint rests upon findings of fact which present no substantial question to this Court. A study of the opinion of the District Court reveals that no novel or new propositions of law are relied upon and no unique legal or legal-economic analysis is set forth. The District Court made proper determinations of fact supported by evidence which are not clearly erroneous. It correctly applied the relevant statutes and case law as announced by this Court in dismissing the complaint.

ARGUMENT

Contrary to the position of the Justice Department in cases such as this, the fact that the government has been unsuccessful in antitrust litigation does not, in itself, mean that the appeal presents substantial questions for review by this Court. The District Court found as a fact that the acquisition of International Color Print Corporation by Greater Buffalo Press "had no reasonable probability of

substantially lessening competition in the color comic supplement industry" (District Court Opinion, p. 37[1]).

This finding is amply supported by the evidence. The decision of the District Court evidences a complete awareness of the unique features of the industry. Any meaningful discussion of the substantiality of the questions attempted to be presented to this Court must necessarily proceed from the particular and peculiar facts which make up the color comic supplement printing business as an acquisition should "be functionally viewed in the context of its particular industry". *Brown Shoe Co. v. United States*, 370 U. S. 294 at 322 (1962).

Greater Buffalo Press is one of several firms that print color comic supplements for newspapers. Many other firms do such printing for newspapers. Many newspapers print their own. Every newspaper has the ability to print its own comic supplements, but many have found that it is more economical to obtain the supplements from independent sources (Opinion, pp. 26, 27; Jurisdictional Statement, p. 5). There is in the business a state of flux in that many newspapers that never printed their own comic supplements are now doing so, and many others that used to print their own now obtain them from comic printers.

Since the material contained in the comic strips is copyrighted, the newspapers must be licensed to publish each specific comic appearing in its supplement. The licensing of such comics is done through syndicates such as King Features Syndicate, a subsidiary of the Hearst Corporation, and Newspaper Enterprise Association, Inc. These syndicates also sell the printing of the supplements. The

[1] Citations to the opinion of the District Court refer to pages of appellant's Jurisdictional Statement.

syndicates not only control who shall publish comics on a broad, regionally exclusive basis[2] but also control other licenses such as nationally syndicated writers and columnists whose appeal to the reading public is extensive. The loss of either desirable comic strips or of popular national columnists can seriously affect the circulation of a newspaper.

Any newspaper seeking to furnish its readers with a color comic supplement may do so in either of two ways. It can negotiate with these syndicates for the license to publish the individual comics it desires and then either print the color comic supplement itself or contract with one of many color printers to print the supplement. Alternatively, it can contract with these syndicates for both the license and the furnishing of the printed color supplement product.

One need not be familiar with the newspaper business to understand the difficulty smaller newspapers would have in resisting attempts by the syndicates to also obtain the printing. Dealing with the syndicate exclusively for both the licensing and furnishing of the finished comic supplement can benefit the newspaper in obtaining or holding the exclusive license to both the comic features and the columnists who have great appeal with its readers. Collateral to this method of furnishing a color comic supplement is the ability of the syndicates such as King and Newspaper Enterprise Association to offer smaller newspapers a "ready-print" supplement section which is a prepared supplement section containing the same comic features with only a masthead change substituting the name of each newspaper using the ready-print section (Opinion, p. 29).

[2] The legality of this practice was not an issue in this case, but is now the subject of a number of pending cases. See footnote 3, p. 5 of Jurisdictional Statement.

This eliminates set-up charges which might be prohibitive for a small newspaper either printing its own or contracting with a printer.

The fees charged for the licensing of features by the syndicate are not established by published price lists, but are negotiated between the newspaper and the syndicate (Opinion, p. 27; Jurisdictional Statement, p. 5). Greater Buffalo Press has no control over the licensing of features. It owns no feature rights of its own, and has never engaged in the licensing aspect of the business (Opinion, p. 29; Jurisdictional Statement, p. 6). Its business consists exclusively of printing color comic supplements for those who have obtained the licensing rights elsewhere. International, on the other hand, has never printed color comic supplements for newspapers. Its business was solely that of a captive contract printer engaged in printing the comics for the King Features Syndicate, subsidiary of the Hearst Corporation, which is engaged in the sale of features to newspapers (Opinion, p. 36).

International never employed a sales force of its own and its sole source of business was King Features Syndicate (Jurisdictional Statement, p. 7). International's contract with King was cancellable on six months' notice (Jurisdictional Statement, p. 7). Hearst, King's parent, has always had and continues to have the capability of printing the comic supplements for both King's customers and Hearst's own papers (Opinion, p. 37). Some of Hearst's subsidiary newspapers print their own color supplements (Jurisdictional Statement, p. 8). But, as the government's Jurisdictional Statement notes, both King Features Syndicate and Hearst have a "policy" of not getting into the business of printing color comic supplements for others (Jurisdictional Statement, p. 8).

A. The effect of the acquisition was to benefit competition in the sale of color comic supplement printing.

Greater Buffalo Press, a family-owned business guided by the genius of its founder, Walter Koessler, was and is the most efficient printer of color comic supplements. Unaided by the benefits of public financing and due in large part to his mechanical talent, he was able to develop a system of pre-registry in the color printing field which enabled Greater Buffalo Press to produce a higher quality product at a lower price (Opinion, p. 28; Jurisdictional Statement, p. 6).

Because the acquisition took place fifteen years ago, the District Court was able to examine not what "might be the effect", or what "probably will be" the effect but rather what *was* the effect of the acquisition. It found that the competition had not lessened but had increased (Opinion, p. 38). The reason it had increased is because Greater Buffalo Press was able to help International install its advanced process of pre-registry by use of its "improved methods and engineering skills" (Opinion, p. 38). This enabled International to immediately increase its product from 16,000 per press hour to 20,200 per press hour of its admittedly "better quality product" (Jurisdictional Statement, p. 5). The result of this was to enable the syndicates to offer large newspapers, as well as smaller newspapers purchasing "ready-prints" a better quality product at a cost less than they would be able to obtain the product elsewhere or produce it themselves.[3] The syndicates

[3] As an illustration of the "changed circumstances" and to show that competition continued in the industry we note that approximately thirty newspapers printing their own color comic supplements in 1955, elected thereafter to obtain printing from syndicates or printers; *i.e.* Beaumont, Texas Enterprise; Bridgeport, Connecticut Herald; Charlotte, North Carolina; Daytona Beach News; Denver Post; Denver Rocky Mountain News; Elmira, New York Star Gazette & Telegram; Ft. Smith Times Record; Galveston, Texas Tribune; Jacksonville

(Footnote continued on following page)

were assured of a permanent source of high quality printing. Competition in the sale of the printing flourished as a result. The syndicates became more competitive. The product they could furnish to their customers via "ready-print" was stabilized and improved.

A hallmark of restrictive competition is rising prices in favor of the remaining competitors. Yet Greater Buffalo Press has not raised its prices in fifteen years. The reason for constant prices during this period of rising cost is competition, both actual and potential. Should Greater Buffalo Press raise its prices to the point where others can profitably print color comic supplements, the newspapers and syndicates would enter the field and are able to do so without capital investment since the facilities including their own are at their disposal.[4] The District Court recognied this:

> "There is every reason to believe that if at any time the cost of purchasing such color comic supplements exceeds the cost to the newspapers of printing them, the newspapers will do the printing themselves" (Opinion, p. 27).

As a result of the acquisition, the syndicates have the best of both possible worlds. They remain possessed of

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(Footnote continued from preceding page)

Times Union; Jefferson City, Missouri Post Tribune; Coshocton, Ohio Tribune; Laredo, Texas Times; Little Rock, Arkansas Democrat; Memphis Commercial Appeal; Missoula, Montana Sentinel; Muskogee, Oklahoma Times Democrat; New Orleans Times; Oakland Tribune; Owensboro, Kentucky Messenger; Pasadena Star; Philadelphia Bulletin; Philadelphia Inquirer; Pittsburgh Press; Portland Oregonian; San Francisco Chronicle; Springfield, Massachusetts Republican; St. Louis Post Dispatch; Tampa Tribune; Yakima, Washington Hearld.

Of the comic printing business of these newspapers, eleven were obtained by Greater Buffalo Press, five by King Features Syndicate, four by Acme Printing, three by Newspaper Enterprise Association, three by Hearst, and one each by Eastern Color, Southern Color, World Color, and Bartlesville, Oklahoma Examiner-Enterprise.

[4] See list of newspapers that now print their own comics that did not do so in 1955 set forth in footnote 5 *infra*.

their monopoly power with respect to licensing and have a supplier of quality color printing at a price economically advantageous to them. Their ability to compete with each other and to persuade newspapers to purchase their product rather than print it themselves is enhanced, for now they are able to supply a finished product of higher quality. Indeed, the syndicates are now better able to lure both the customers of other printers and those newspapers that formerly printed their own comics since now the finished product of the syndicates is equal in quality to that of Greater Buffalo Press. Elimination of the least efficient printer in no way violated the antitrust laws for the "protection of competition not competitors" is the purpose of Section 7. *Brown Shoe Co. v. United States*, 320 U. S. 294 at 324 (1962). Speaking before a meeting of the American Bar Association Section of Antitrust Law in 1967, Federal Trade Commissioner Philip Elman stated:

> "But no merger has ever been held unlawful on the ground that by increasing the efficiency of the parties to the merger, it hurt their competitors. No case has been, or is likely to be, brought on such a theory. I have read about, but see no real evidence of, a conflict between the merger law and economic efficiency. *Where the only consequence of a merger is to achieve greater economies and increased efficiencies, who—I ask—will attack it as anti-competitive?*" (italics ours). 36 A. B. A. ANTITRUST L. J., *Merger Rules and Guidelines* 23 at 27 (1967).

The government is in error in attacking as anti-competitive the acquisition of International which admittedly achieved great economies and increased efficiency.

B. The acquisition of a non-competitor did not have the effect of substantially reducing competition.

International never competed with Greater Buffalo Press for newspaper printing. Its acquisition by Greater Buffalo Press could not in any way lessen competition between the two which never existed. The District Court defined the relevant product market and line of commerce to properly reflect the existing situation in the color printing business. By distinguishing between the printers that print for newspapers and those that print for syndicates the court took into account the power the syndicates possess over the licensing of copyrighted features. This is evident from the finding of the court:

> "These are the lines of commerce—to treat them together as one line of commerce, *i.e.* the printing and sale of color comic supplements would be to ignore the tremendous leverage of the syndicates which control the copyrighted features. The testimony of Walter Koessler and other witnesses in this case has established firmly that the syndicates, and in particular King, have a unique position by virtue of the legal monopoly which they have over the copyrighted features. The court is of the opinion that the peculiar characteristics and business uses of copyrighted features justify considering printing for syndicates as a separate product market" (Opinion pp. 30-31).

This was an eminently sensible distinction to make. Otherwise, the product market would have included King as a competitor in the printing business and King does no printing at all. The combinaton of printing and selling of supplements urged by the government as an appropriate line of commerce would have resulted in an over-broad and artificial analysis which would not have reflected the situation in the industry. It would have included as printers those who are *not* and treated as sellers those who do *not*.

And one of the reasons why the printers cannot be classed together is because the syndicates do not separate the prices charged for printing from those charged for licensing. Proper market definition separates sellers from printers and syndicate printers from printers for newspapers. Thus, while it may be true that Greater Buffalo competes with King for sales, it does *not* compete with International for sales or with King for printing. And because International's sole customer, King, controls the features, Greater Buffalo cannot compete with International for printing because Greater Buffalo's prices do not include the licensing right.

The artificiality of the product markets urged by the government and the tortuous reasoning engaged in by the government is amply reflected by the repeated references to "International-King" (Jurisdictional Statement, pp. 16, 17). Such references ignore the separate corporate entities of these concerns and erroneously convey the impression that Greater Buffalo Press obtained part of King by an acquisition. This is simply not true nor is there any support in the record for such a supposition. Moreover, the fact persists that Greater Buffalo Press did not obtain a contractual right to print for King by acquiring International. King could have gone to other printers or used the facilities of Hearst to do the printing itself. While Greater Buffalo Press may have had "high hopes" (Jurisdictional Statement pp. 17, 18, fn. 10) for obtaining the printing contracts because of its improved methods and pre-registry system, the appellees are unable to locate any reported case for the proposition that "high hopes" constitute a *per se* violation of Section 7. Indeed, it did obtain such contracts but only because it was and "is the most successful and efficient comic supplement printer, largely

because of the technical and innovative skills of its president, Koessler'' (Jurisdictional Statement, p. 6). Whatever the salutary purposes of the Clayton Act, inefficiency should not be fostered and efficiency penalized by enforcement of its provisions.

C. The District Court properly rejected the "numbers game" test relied on by the appellant below and now advanced as presenting a substantial question.

The appellant, relying on previous discredited statistics, blandly asserts that Greater Buffalo Press "obtained approximately three-quarters of the industry's printing capacity" (Jurisdictional Statement, p. 14). This erroneous assertion, based on fragmentary figures which do not include the color prints of newspapers which do their own printing, and premised on the broad and artificial product market urged below, do not merit consideration. The District Court impliedly rejected the "numbers game" test. *United States v. Phillipsburg National Bank,* 399 U. S. 350 at 376 (1970). This was clearly demonstrated by the District Court's question to counsel for the government on final argument:

> "The Court: What are you urging me to do, find like a formula that 30% equals violation?"
>
> (Transcript, December 17, 1969, p. 5, line 18.)

The rejection of the government's analysis is amply supported by previous decisions of this Court and by the evidence in this case casting serious doubts on both the applicability and relevancy of the cited statistics with regard to this particular industry.

The District Court correctly declined to follow this computer-like *"res ipsa loquitor* approach to anti trust

cases" *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568 at 581 (1967).

D. The divestiture by Greater Buffalo Press of International at this time would be inequitable and would only serve to benefit Hearst and King Features who were originally alleged to be the principal wrongdoers.

This litigaton was initiated as the result of a complaint concerning tie-in practices of King Features, *i.e.* the tieing of licenses for features with contracts for the printing thereof. This action was halted against Hearst and King Features by entry of an innocuous consent decree on August 31, 1965. This decree, characterized as a "somewhat unusual conditional decree" in the government's Jurisdictional Statement in a footnote at p. 15, was said to have been agreed upon by the government to protect King's abilty "to complete effectively". Thus, King, the alleged predator, became the party for whom the government sought protection. The trial court's comment on this phase of the litigation appears in the Jurisdictional Statement at p. 24. King has become the ward of the government since it is King who is allowed to continue negotiating license fees and printing costs in package form (the original basis for the commencement of the action). King's alleged violation seems to have become unimportant and the government's only concern seems to be that King be furnished with an independent supplier of printing.

This is a most unusual case in that every customer of Greater Buffalo Press and every customer of International has at all times had and continues to have easy access to the market with the continued ability to print its own comic features. Why, in the circumstances, the Justice Department should continue to concern itself with this case in

the face of findings of fact adverse to its contention, we do not know. We believe that the observation of Mr. Justice Harlan in *U. S. v. Phillipsburg National Bank*, 399 U.S. 350 at 374 (1970) is applicable to the case at bar.

> "With tigers still at large in our competitive jungle, why should the Department be taking aim at such small game?"

The government's citations to bank merger cases have no application to the case at bar but even in the bank cases it has been stated that:

> "New entry can, of course, quickly alleviate 'undue' concentration. And the possibilty of entry can act as a substantial check on the market power of existing competitors." *U. S. v. Phillipsburg National Bank*, 399 U. S. 350 at 377 (1970).

The ability to open a bank cannot be seriously compared to the ability of a going newspaper to print comic supplements for itself and others. Indeed, the "changed circumstances" (Jurisdictional Statement, pp. 4, 5, fn. 2) which persuaded the government to abandon its conspiracy charges against all of the defendants indicate that the competitive situation since 1955 remains healthy due to the entry of 13 newspapers[5] into the color printing field.

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[5] Meridian, Mississippi Star; Augusta, Georgia Chronicle; Savannah, Georgia News; Miami, Florida Herald; St. Petersburg, Florida Times; Hackensack, New Jersey Record; Jackson, Mississippi Clarion Ledger; Bartlesville, Okla. Examiner; Chickasha, Okla. Express; Okmulgee, Okla. Times; Tacoma, Washington News-Tribune; Worcester, Mass. Telegram; Hays, Kansas News; Fairfield, Calif. Republic; Sacramento, Calif. Union. The supplement volume of these papers ranges from over 1,500,000 to approximately 16,500 four-pages sections per week which demonstrates that size is no obstacle to entry.

CONCLUSION

The question presented is not substantial. The judgment should be affirmed.

Dated: November 5, 1970.

Respectfully submitted,

FRANK G. RAICHLE,
Attorney for Appellees,
10 Lafayette Square,
Buffalo, New York 14203,
Telephone: 716-852-7587.

RAICHLE, BANNING, WEISS & HALPERN,
ARNOLD WEISS,
RALPH L. HALPERN,
Of Counsel.